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NO. 89-1409

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN C. OSTRANDER

Petitioner,

v.

LINDA K. WOOD

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly determined that there were triable issues of fact precluding summary judgment on Respondents' claim brought pursuant to 42 USC Sec. 1983 that she was denied her liberty interests in personal security and bodily integrity protected by the substantive component of the Due Process Clause of the Fourteenth Amendment, when the facts viewed in light most favorable to Respondent show that following the arrest of Respondent's companion, petitioner, a trooper of the Washington State Patrol, callously abandoned Respondent, alone, late at night, in a high crime area, without money or a means of transportation and as a result of said abandonment, Respondent was a victim of a rape and impregnation which ultimately resulted in the birth of a child?

2. Whether Petitioner's abandonment of Respondent, late at night in a high crime area, which created and/or exacerbated the dangers from which Respondent ultimately suffered injury, was such an affirmative abuse of the powers conferred under color of state law to Petitioner as to distinguish the instant case from the Court's

recent opinion in DeShaney v. Winnebago County[1]?

3. Whether the Federal Circuit Courts after the DeShaney opinion have in fact rendered such conflicting decisions as to warrant consideration of the instant case by the United States Supreme Court?

4. Whether Petitioner's actions towards Respondent were so egregious as to "shock the conscience" thus exposing him to liability for violation of Respondent's rights to substantive due process regardless of whether any form of a "special relationship" existed?

5. Whether the issue of what is the appropriate degree of fault necessary to establish a substantive due process claim is ripe for review when the Circuit Court's holding was rendered in response to the Petitioner's argument that the conduct alleged was "at most negligent" and the question of what is the precise definition of the standard to be applied beyond simple negligence but short of intentional conduct was neither briefed nor argued before the Circuit Court?

6. Whether it is necessary to resolve if recklessness or gross negligence are sufficient

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[1]DeShaney v. Winnebago Cty. So. Serv. Dept. ___ U.S. ____ 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

to establish a substantive due process claim when the facts of the instant case would support a finding that Petitioner's disregard for Respondent's safety amounted to deliberate indifference?

7. Whether the Circuit Court was correct in denying Petitioner qualified immunity, when a well-seasoned, pre-existing case from another circuit with almost identical facts, had held that the specific conduct alleged constituted a violation of substantive due process?

8. Whether the Circuit Court in the instant case had an alternative basis for denying Petitioner's claim of qualified immunity on the grounds that the concepts of good faith immunity and deliberate indifference are mutually exclusive?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Linda K. Wood, respectfully prays that for the reasons discussed below, that a writ of certiorari not issue to review the judgment of the United States Court of Appeals

for the Ninth Circuit and that said decision remain unaltered and allowed to stand.

OPINIONS BELOW

Respondent agrees and adopts Petitioner's description of the decisions of the Court of Appeals for the Ninth Circuit and the District Court at issue herein and for sake of brevity further incorporates Petitioner's appendices as if fully attached hereto. Petitioner neglected to point out that the District Court's dismissal of the instant case was following Petitioner's second motion for summary judgment. The District Court's order denying Petitioner's initial motion for summary judgment is reproduced in the appendix beginning at 1a.

STATEMENT OF JURISDICTION

Respondent concurs in Petitioner's statement of jurisdiction and the description of the parties set forth in Petitioner's footnote No. 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that this case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that it was brought pursuant to 42 USC Sec. 1983.

STATEMENT OF THE CASE

A. Procedural History.

1. District Court.

On December 31, 1985, Respondent filed her initial complaint with the United States District Court for the Western District of Washington at Tacoma. In her initial complaint, Respondent alleged her civil rights were violated when on or about September 23, 1984, Trooper Ostrander, after arresting her companion, abandoned Linda Wood late at night along the side of a roadway with "total disregard for her safety". The Defendants duly answered.

On or about September 15, 1986, Petitioner filed his first motion for summary judgment. Petitioner contended that Respondent's claims, even if true, constituted, at most, negligence and as such, did not state a claim under 42 USC Sec. 1983. The Petitioner further contended that even if Respondent was deprived of a constitutionally protected interest, she had an adequate state tort remedy that precluded her civil rights claim.

On November 12, 1986, the District Court denied the summary judgment motion without prejudice. District Court Judge Bryan reasoned in part:

> More specifically, can his actions [Ostrander's] be characterized as actions taken intentionally and with reckless

> disregard of plaintiff's Constitutionally protected liberty interest in her personal security. Upon review of the disputed facts and facts left unresolved by the affidavits of the parties, Trooper Ostrander's actions cannot be so clearly characterized as merely negligent ... (Emphasis added). See, 879 F2d at 586.

On March 5, 1987, Respondent sought leave to file a clarifying amended complaint. Appendix beginning at 10a. While this motion was pending, Petitioner filed his second motion for summary judgment on several grounds, including qualified immunity and lack of proximate cause.

On April 24, 1987, the District Court dismissed Respondent's claim on the ground of qualified immunity and that Ostrander owed no "affirmative constitutional duty of protection" to Wood. Respondent filed a timely appeal of the dismissal decision. 879 F2d at 586.

2. The Court of Appeals.

Petitioner on appeal sought affirmance on the grounds of not only qualified immunity, but also on the grounds 1) that no recognizable civil rights violation had occurred 2) Respondent's claim was barred by the existence of adequate state remedies; and 3) that the conduct

alleged by Respondent, at best, showed mere negligence and that intentional conduct was an essential element of a Section 1983 claim.

In its original opinion which is set forth at 851 F2d 1212 (9th Cir. 1988) (hereafter Wood I), the Circuit Court reversed the District Court's dismissal on the grounds that under the facts alleged, Linda Wood had established triable issues of fact as to whether or not she had been a victim of a deprivation of her rights to substantive due process. The Court rejected Petitioner's arguments that his conduct was "merely negligent" and denied his claim of qualified immunity. In denying Ostrander qualified immunity, the Court looked to the factually similar case of White v. Rochford, 592 F2d 381 (7th Cir. 1979) to show that it was sufficiently established that police abandonment of citizens and indifference to exposing them to danger implicated substantive due process concerns.

Following rehearing before the same panel, the Circuit Court generated the amended opinion which is set forth at 879 F2d 583 (9th Cir. 1989) (hereafter Wood II). In its amended opinion, the Court provided additional rationale for its initial decision to reverse the District Court's

grant of summary judgment.

Petitioner's requests for rehearing and rehearing en banc were denied with regard to each of the opinions.

B. Statement of Facts.

At 2:30 a.m. on the morning of September 23, 1984, Trooper Ostrander pulled a car to the side of the road for driving with its high beams on. The occupants of the vehicle were Robert Bell and his date for the evening, Linda K. Wood, who were at the time of the stop winding down their evening and heading home. Ostrander removed Mr. Bell from the vehicle, determined he had consumed alcohol beyond the legal limit and placed him under arrest. Wood denies that she was intoxicated or if Ostrander ever inquired as to whether she had been drinking.

Ostrander returned to the car and removed the car keys and told Wood to get out of the car. Wood asked the trooper what was she to do and how was she to get home. Ostrander once again coldly told Wood to get out of the car. She complied. Ostrander returned to his patrol car and drove away with Bell and the car keys, leaving Linda Wood standing alone on the side of the roadway.

In his deposition, Bell described the following with regard to Ostrander's attitude

relative to Wood and leaving her alone, stranded on the side of the road:

Edwards: Q. Was Trooper Ostrander rude to You? Obviously, it was not a pleasant situation.

Bell: A. I wouldn't say rude, no. Just at the time when we left, when I asked him what was he going to do, leave her standing there, then just the attitude like well, he didn't give a damn, and thats the attitude he gave me. ...

After the trooper's departure with Mr. Bell and the car keys, Wood began walking down the roadway towards home - five miles away. The night was cool (50 degrees), she had no coat and was wearing only a blouse. It was undisputed that the Parkland area where the abandonment occurred is near a military reservation and despite being a small geographic area, has the highest aggravated crime rate in Pierce County, outside the City of Tacoma. (Trooper Ostrander had been stationed and living in this area for a number of years).

Wood had no money and her parents with whom she lived could be of no aid. Her mother suffered night blindness and her step-father has

brain damage. As she walked down the highway, several males drove by and without solicitation offered to give Wood a ride. She declined these offers. Finally, Wood did accept a ride with an unknown man. The unknown driver drove Wood to a secluded area and raped her.

Nine months and a day following her rape, Wood gave birth to a son. Paternity testing established that Robert Bell, Wood's boyfriend at the time of conception, could not be the child's father.

Trooper Ostrander's version of the events of September 23, 1984 are strikingly different then that of Wood's. Ostrander claimed that he offered to call a friend or family member who could give her a ride home but she declined the offer. Ostrander further claimed in his report to his superiors on the incident that Wood was picked up by an unknown driver, whom he assumed was her "friend", before he drove away with Bell. Bell and Wood denied that she was picked up by any friends at any time. The majority opinion below found Ostrander's version of events to suggest that he had fabricated a cover story to give to his superiors. 879 F2d at 590.

Due to the fact that the matter was before it on a dismissal following a summary judgment

motion, the Circuit Court reviewed the matter de novo and viewed the facts in a light most favorable to Wood, the non-moving party. 879 F2d at 586-87. The Circuit Court, viewing these facts in such a manner, found that it was for the jury to determine whether Wood's civil rights were violated and did not approve the District Court's factual assumptions in dismissing Respondent's case. 851 F2d at 1219.

REASONS FOR DENYING PETITIONER'S REQUEST FOR WRIT

1. The Ninth Circuit's Opinions In The Instant Case Are Consistent With The Principles Espoused By DeShaney and Its Progeny And Do Not "Open The Floodgates" Of Unlimited Public Liability As Suggested By Petitioner.

The instant case does not involve the imposition of an unlimited duty on the government to provide protection to its citizens. The Ninth Circuit's decisions simply recognized that Ostrander engaged in an affirmative form of police brutality. As noted in Davidson v. Cannon, 474 U.S. 344, 348, 106 S.Ct. 662, 88 L.Ed.2d 677 (1986), the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power and from using it as an instrument of oppression. See, DeShaney

v. Winnebago Cty. D.D.S., ___ U.S. ___ 109 S.Ct. at 1003; Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 88 L.Ed.2d 677 (1986). Unlike DeShaney, the state actor in the instant case was anything but a passive actor. See, generally Horton v. Charles, 889 F2d 454, 458 (3rd Cir. 1989) (rejecting the blanket proposition that DeShaney can be interpreted to mean that in no instances the state has an obligation to prevent harm from third-parties). Ostrander's actions if not deliberately, then recklessly, rendered Respondent vulnerable and placed her in a position of danger after removing, without substitution, the means she had to reasonably extricate herself from such danger. The Ninth Circuit was correct in viewing the instant case as being meaningfully distinct from DeShaney and relied on the following quoted language in DeShaney to emphasize the distinction:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them. (Emphasis added).

DeShaney, 109 S.Ct. at 1006; Wood (II) 879 F2d at 590.

The Ninth Circuit's view that White v.

Rochford, 592 F2d 381 (7th Cir. 1979), and the principles derived therefrom, survived DeShaney is supported not only by DeShaney, but also the history of the so-called "special relationship" doctrine that was evolving prior to the Court's decision in DeShaney.

Before DeShaney was decided by the Supreme Court, the Seventh Circuit provided a comprehensive analysis of the so-called "special relationship" cases which it had generated over the years. See Archie v. City of Racine, 847 F2d 1211 (7th Cir. 1988); cert denied ____ U.S. __ 109 S.Ct. 1338, 103 L.Ed.2d 809 (1989) (the Archie case was relied on by the majority in DeShaney, 109 S.Ct. at 1002). After indicating that its White opinion still constituted "good law", Judge Easterbrook's majority opinion provided, at page 1233:

> Courts sometimes sum up such cases by saying that the Due Process Clause requires the state to protect those with whom it has a "special relationship". Like other legal phrases, this one has acquired a life of its own. Instead of being a shorthand for the kind of circumstances reflected in Byrd and White - cases in which the state either deliberately inflicted injury or greatly

> increased risk while constricting access to self-help - it has become a magic phrase, a category in which to dump cases when a court would like to afford relief ... Instead of trying to define the phrase with the greater precision, it is better to jettison the language while adhering to the principle that the phrase once summarized. When the state puts a person in danger, the Due Process Clause requires the State to protect him to the extent of ameliorating the incremental risk. When the state cuts off sources of private aid, it must provide replacement protection. (Emphasis added; citation omitted).

In otherwords, it was Judge Easterbrook's studied opinion that White and cases like the instant case, where the State had greatly increased the risk of harm by placing a person in a position of danger, were among the "true" special relationship cases, but since that label had been utilized for other types of cases, it should be discarded while the basic underlying principles of cases such as White should remain.

Judge Posner's concurrence also provides support for the proposition that White and DeShaney are distinguishable and involve two

different types of cases. Judge Posner, at page 1226 provided:

> Admittedly, there is a tension between the decision today and cases such as White v. Rochford, 592 F2d 381 (7th Cir. 1979), which imposes liability for failure to rescue when the government placed the victim in a position of danger in the first place. The distinction between putting someone in a place of danger and enhancing the danger faced by someone who already is in danger (but through no fault of government) is a subtle one. We said in DeShaney that in the former case the government's conduct is apt to create a greater incremental probability, and thus a more palpable cause of the victim's injury, than in the latter case. The distinction is only one of degree, but perhaps of sufficient degree to make a constitutional difference, though that need not be decided in the present case. For this is not a case of the government's having placed the victim in danger; the danger to DeLacy came from her emphysema, though it was increased by Giese's negligence. (Emphasis added).

The "tension" recognized in Judge Posner's

decision is dispelled once it is remembered, that as noted in Daniels, supra, and Davidson, supra, the purpose underlying the Due Process Clause is to prevent injury from "an affirmative abuse of power". As noted in the 7th Circuit decision in DeShaney v. Winnebago Cty. D.S.S., 812 F2d 298, 303 (7th Cir. 1987), when as in White and as in the instant case, the State places a person in a situation of high risk, markedly increasing the probability of harm, the State's actions become the cause of the harm should it occur. Unlike White, in both DeShaney and in Archie, the State did nothing to create the danger faced by the plaintiffs therein.

As discussed infra, although DeShaney does establish that simple awareness of a danger to an individual is insufficient for the imposition of liability, DeShaney expressly indicates that when the state affirmatively asserts its power to aide in the creation of danger, liability can attach.

Prior to DeShaney, the Ninth Circuit, unlike the Seventh Circuit was among those Circuits adopting an expansive view of what constituted a "special relationship" and had gone beyond White and custodial situations. See, Escamilla v. City of Santa Ana, 796 F2d 266 (9th Cir. 1986); Balistreri v. Pacifica Police Dept., 855 F2d 1421

(9th Cir. 1988). (The Court in DeShaney, 109 S.Ct. at 1004 n.4 expressly disapproved of Balistreri and cases like it which had imposed liability based solely on the State's awareness of danger and its affirmative commitment to help the individual).

Although Balistreri is obsolete in light of DeShaney, it does provide an example from which the pre-DeShaney "special relationship" doctrine can be examined. In Balistreri, the court provided the following factors to determine whether "a special relationship" existed. These factors, for the purpose of this discussion can be utilized to distinguish among the many types of cases which, prior to DeShaney, had fallen under the "special relationship" title:

> To determine whether a "special relationship" exists, a court may look to a number of factors, which include (1) whether the state created or assumed a custodial relationship toward the plaintiff; (2) whether the state was aware of a specific risk of harm to the plaintiff; (3) whether the state placed the plaintiff in a position of danger, or (4) whether the state affirmatively committed itself to the protection of the plaintiff. (Citations

omitted).

Upon examining the above four factors, it appears that Balistreri and DeShaney are similar, i.e., both factors 2 and 4 were present but factors 1 and 3 were not. While in DeShaney the state had had temporary custody over the child, it had occurred over a full year prior to the severe beating he received and of which he complained of in his action. Under such circumstances, the State's relinquishment of custody over the child was too attenuated to be considered a proximate cause of his injuries. See, Martinez v. California, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980). Absent the proximate cause issue, DeShaney was almost a pure factor 2 case with elements of the fourth in that arguably the state had made an affirmative commitment to help by having in place a child protective service that was involved in the events.

Both DeShaney and Archie show that in the absence of factor 1 (custody) or factor 3 (placing a person in danger), liability cannot be imposed. Both of these factors alone or standing together indicate the existence of an affirmative abuse of governmental power as the source of the injury.

In the instant case, it is a question of fact as to whether Ostrander placed Respondent in a position of danger. 879 F2d at 589-90. Ostrander is chargeable with the knowledge of the danger Wood faced. Id. Through its common law, Washington State arguably committed its police officers to help persons like Respondent under the circumstances of the instant case. Id. See, Chambers - Castanes v. King County, 100 Wn.2d 275, 669 P2d 451 (1983).

Based on the above analysis, it is suggested that the instant case and DeShaney are simply different types of cases, even though out of convenience, they both could be labeled "special relationship" cases.

Nor should the instant case be confused with cases such as Martinez, supra, where liability was sought to be imposed based on the state's relationship with the third-party criminal actor. See, Ketchum v. Alameda County, 811 F2d 1243 (9th Cir. 1987); Wright v. City of Ozark, 715 F2d 1513 (11th Cir. 1983). These again are simply different kinds of cases which not only involve attenuated proximate cause, but also unforeseen victims. Under the circumstances of the instant case, Respondent was more than simply "a member of the public at large". She was a foreseeable

victim who was injured within the zone of danger created by Ostrander's abusive conduct.

Other non-custody cases beyond White, DeShaney and Archie, have indicated that substantive due process is implicated when a state official exposes a citizen to danger and then fails to take efforts to ameliorate the potential or actual harm that results. See, e.g. Jackson v. City of Joliet, 715 F2d 1200, 1206 (7th Cir. 1983) (distinguishing where state officials have created the danger from situations where the state simply fails to provide aid to a person injured by a danger that the state played no part in creating); Branburry v. Pinellas County, 789 F2d 1513 (11th Cir. 1986) (distinguishing failure to rescue someone in danger from situations were the state actively causes injury); Estate of Gilmore v. Buckley, 787 F2d 714 722 (1st Cir. 1986) (recognizing that if a state places a person in a position of danger liability under Sec. 1983 might attach); Washington v. District of Columbia, 802 F2d 1478, 1481 (D.C. Cir. 1986) (Constitutional right to protection exists if person in custody or if the state cuts off sources of private aid). Escamilla v. City of Santa Ana, 796 F2d 266, 269-70 (9th Cir. 1986); Bowers v. DeVito, 686 F2d 616

(7th Cir. 1982), White v. Rochford, supra.

The rationale for imposing liability under limited non-custodial circumstances was eloquently stated at page 618 of the Bowers opinion:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

In the instant case, Trooper Ostrander threw Respondent "into the snake pit" by callously removing Respondent from her only available means of transportation and protection and left her cold and alone late at night in a high crime area at the mercy of any two-legged nocturnal predator that happened to view her plight. It is suggested that as recognized by the Ninth Circuit, instead of abandoning Wood to dangers which would have been apparent to anyone with a minimum of common sense, Ostrander owed a duty to Wood "to afford her some measure of peace and safety". 879 F2d at 590. Having disregarded this duty, Ostrander should be held responsible for the deprivation of Woods' liberty interest in her personal security and bodily integrity which

resulted from his conduct. See, generally Ingraham v. Wright, 430 U.S. 651, 674-75, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); Hall v. Tawney, 621 F2d 607 (4th Cir. 1980).

Petitioner's contention that DeShaney created a strict "in-custody" limitation is not supported by the language of the opinion or the post-DeShaney cases cited by Petitioner in his effort to somehow show that the Circuit Courts have been inconsistent in their application of DeShaney. Indeed, it is clear from the cases relied on by Petitioner, that no such blanket limitation exists or that the lower courts have misunderstood DeShaney.

Most of the cases relied on by Petitioner do not address whether a state official's creation or exacerbation of danger can be a predicate for a substantive due process claim. Their primary focus is on whether or not under their facts the complaining party was in "custody" or "quasi-custody". See, Doe v. Bobbitt, 881 F2d 510 (7th Cir. 1989); Horton v. Charles (Flenary), 889 F2d 454 (3rd Cir. 1989); Stoneking v. Bradford Area School Dist., 882 F2d 720 (3rd Cir. 1989) cert. denied sub. nom. Smith v. Stoneking, ____ U.S. ___ 59 U.S.L.W. 3449 (Jan. 16, 1990). In DeShaney, 109 S.Ct. at 1006 the Court provided in

part:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individuals freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraints of personal liberty ... which is the "deprivation of liberty" triggering the protections of the Due Process Clause ... (Emphasis Added; Citations and footnotes omitted).

The Court further left open at footnote 9 the question of whether "quasi-custodial" situations, such as placement of children by the state in a foster-home would be sufficiently analogous to "custody" to allow for the imposition of liability.

In Stoneking, supra, the Court declined to determine whether a child subject to sexual abuse by a teacher while at school was in a situation sufficiently analogous to incarceration as to allow for the imposition of liability under DeShaney. The Court reasoned that rendering such a decision could cause further unnecessary delay. The plaintiff therein had a separate basis for liability under City of Canton v. Harris, ___ U.S. ___ 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

While the dissenting opinion indicated that following DeShaney, the concept of a non-custodial duty of protection was "no longer tenable", the majority prior to deciding not to rule on the issue, indicated that it viewed the school/student relationship as being "functional custody".

Doe v. Bobbitt, supra, did not hold that for a duty of protection to exist that the circumstances must be analogous to incarceration. It simply found that it was not "clearly established law" for qualified immunity purposes that placement in a foster home where there was a risk of abuse would violate the child's constitutional rights.

In Horton, supra, the question was whether the Plaintiff's decedent was in "custody" at the time he was beaten to death by his employer who suspected him of theft. During the "interrogation" of the decedent, a police officer was present and actually questioned the decedent. Not only did the police implicitly approve of the private "interrogation" in question, but they also had a specific written policy of not getting involved in matters occurring in "private clubs" such as the employer's business. The appellate court found the police officer's actions served

to clothe the otherwise private violence with official status and that the town's policy of non-involvement was effectively a delegation of public police functions to a private party.

Key to the Horton Court's rationale was its recognition that the police officer's active role in the events distinguished him from the passive social workers in DeShaney.

Petitioner's reliance on McKee v. City of Rockwell, Texas, 877 F2d 409 (5th Cir. 1989) cert denied 58 U.S.L.W. 3427 (Jan. 9, 1990) and Lipscomb v. Simmons, 884 F2d 1242, 1246 (9th Cir. 1989) for the proposition that DeShaney has left the Circuit Court's in disarray, is unfounded. The McKee case dealt with an equal protection claim. In Lipscomb at page 1246, the Court simply noted that when an individual has a special relationship with the State, "such as a custodial relationship", affirmative constitutional obligations are imposed. In Lipscomb, the Court found that foster children who were wards of the state were in the state's custody thus imposing constitutionally mandated obligations onto the State. Nowhere in Lipscomb did the Court (which included Judge Fletcher, author of the first Wood opinion) hold that custody was "central to" the "existence" of "a

duty". The Lipscomb court simply had no occasion to examine the nature or extent of "special relationships" in non-custodial situations.

Respondent in the instant case also was a victim of a "restraint of her personal liberty". Ostrander's actions prevented Wood from being taken to the safety of home and restrained her ability to help herself by taking away her only reasonably available and safe means of transportation.

The case of Cornelius v. Town of Highland Lake, Ala., 880 F2d 348 (11th Cir. 1989), is the only post-DeShaney case that addresses the same issue as the instant case, i.e., under what circumstances does the Due Process Clause impose a duty of protection based on the State's creation of a danger which causes injury.

In Cornelius, the Court found that a "special relationship" existed between the Plaintiff, a town clerk, and her employers, based on the limitations on her ability to act on her own behalf inherent in her employment relationship with the township and that the defendants had rendered her more vulnerable to harm by exposing her to the inmate work squads which included the inmates who ultimately kidnapped and terrorized her for three days. In

Cornelius, at page 359, the Court concluded:

> ... the defendants here knew that the town employees ... like Mrs. Cornelius were at risk from their culpable actions. Such individuals were well within the identifiable radius of harm known to the defendants - thus under the special danger approach, as well as the special relationship approach, evidence exists that the defendants owed Mrs. Cornelius a duty to protect her from the harm they created.

See, generally Nishiyama v. Dickson County, Tenn., 814 F2d 277 (6th Cir. 1987).

Cornelius and Wood, are totally consistent with DeShaney. Both cases recognize that under the limited circumstances where state officials place a person in danger, they will be liable for the harm that results. What these cases command is neither onerous nor burdensome. This is simply common sense.

Assuming arguendo, that DeShaney, in fact, limited "special relationships", solely to custodial situations, the Ninth Circuit in the instant case recognized that Ostrander's alleged conduct was so egregious as to "shock the conscience", thus affording a separate basis for a finding that Respondent had been deprived of

her constitutional rights to substantive due process. 879 F2d at 591 n.8. See, Rutherford v. City of Berkley, 780 F2d 1444, 1446-47 (9th Cir. 1986); Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed.183 (1952). The Ninth Circuit has held that the liberty component of substantive due process is violated when state officials engage in "brutal" acts that are "offensive to human dignity". Vaughan v. Ricketts, 859 F2d 736, 742 (9th Cir. 1988).

Ostrander's actions defy common sense and common decency and would be counterintuative to a reasonable peace officer. Petitioner's contention that the Ninth Circuit's decisions in the instant case implicates the state's abilities to allocate resources and opens the floodgates to unlimited liability can be viewed as nothing more than a request that the Court sanction his "brutish" and offensive behavior. Petitioner's actions were not trivial or simply "incidental" to Linda Wood. His conduct has profoundly affected her life. No legitimate state interest was served by his conduct or would be served by insulating state official's from liability when they abuse their power and strand innocent women like Linda Wood, without money late at night in high crime areas.

It is suggested that the Ninth Circuit's analysis was correct and Respondent should be allowed to take her claim before a jury on both the theory that Ostrander owed her a special duty and the theory that his conduct "shocked the conscience".

2. The question of What Is The Appropriate Definition Of The Requisite Intermediate Level of Fault Applicable To Due Process Claims Is Not "Ripe" For Review Due To The Petitioner's Failure To Adequately Raise The Issue Before The Ninth Circuit And The Current Posture Of The Instate Case.

In his responsive brief to the Ninth Circuit, Petitioner asked that the Court, as a separate grounds for affirmance, to interpret the Daniels and Davidson decisions to mean that only intentional deprivations were actionable under the Due Process Clause. Petitioner simply never requested that the Ninth Circuit define the exact definitional limitation for what mental state short of intent, but greater then simple negligence is required for the establishment of a substantive due process claim. As indicated in DeShaney, 109 S.Ct. at 1003 n.2, the Court has

the discretion of not reviewing matters which have not been previously addressed in the lower court. As noted in City of Canton, Ohio v. Harris, 109 S.Ct. at 1202 the appropriate time to raise this concern is in the brief in opposition to granting a writ of certiorari.

In the instant case, it was entirely reasonable for the Ninth Circuit to leave it to the District Court to determine, after full briefing, what definitions should be applied to the terms in question. 879 F2d at 588 n.4. Having found that a jury could reasonably find that Ostrander had engaged in conduct that could be characterized as "deliberate indifference", the Ninth Circuit, following its own precedent determined that it was for the finder of fact to determine whether Ostrander's mental state fell within the available spectrum. Fargo v. City of San Juan Bautista, 857 F2d 638, 641 (9th Cir. 1988). Following trial of the instant case, the Ninth Circuit surely would be in a better position to evaluate the record and resolve where Ostrander's conduct fell. Based on the record before it, the Ninth Circuit simply could not determine as a matter of law that Ostrander had not acted with "deliberate indifference", when he stranded Wood.

The Ninth Circuit did not in its amended opinion provide as a general rule of application that "gross negligence" or "recklessness" would be the recognized standards of fault in substantive due process claims. 879 F2d at 587-88. The majority opinion made it very clear that it was retreating from the position which had been taken in the original opinion at 851 F2d at 1214-15. The Ninth Circuit cautiously assumed that following City of Canton that "a deliberate indifference" standard would apply and that it was a jury question in the instant case as to whether Ostrander acted with such a mental state. 879 F2d at 588.

Petitioner's contention is simply erroneous that the Ninth Circuit's analysis failed to take into account whether Ostrander's conduct involved the kind of an affirmative abuse of power required by Davidson, 474 U.S. at 347. The amended opinion provided at page 588:

> In the present case, the facts put in issue by Wood - that Ostrander arrested the driver, impounded the car, left Wood by the side of the road at night in a high-crime area - show an assertion of government power which, according to Woods' version of the case, tends to show a disregard for Woods'

safety amounting to deliberate indifference. (Emphasis added).

Even with application of the "heightened definition of recklessness" set forth in Archie v. City of Racine, 847 F2d at 1219, Ostrander's conduct would not be immunized from liability. As previously discussed, the record infers that Ostrander knew that Respondent would be exposed to danger. He had been asked for help by Respondent and queried by Bell about Respondent's predicament, but he simply did not care whether she came to harm or not. The Ninth Circuit for the same reasons concluded that a jury may very well find that Ostrander's abusive use of his power "shocks the conscience". 879 F2d at 591 n.8.

The vast majority of Circuit Courts that have considered the question, have held that conduct that is more than negligent but less than intentional is sufficient to trigger due process clause protections. See, Fargo v. City of San Juan Bautista, 857 F2d at 640-41 n.3 (collecting and discussing cases). See, also Woodrum v. Woodward County, Okl., 866 F2d 1121, 1126 (9th Cir. 1989) (noting Wood I was consistent with the majority of the Court of Appeals on the issue). It is suggested that if the Ninth Circuit erred

in its analysis, it erred in a manner favorable to Petitioner.

Petitioner's "degree of control" and "independent reasons for the state's actions" arguments are being raised for the first time in his petition and should not be considered. Even if considered, they do not warrant review of the instant case.

Petitioner's "degree of control" argument misperceives the nature of Respondent's claim. As previously discussed, Respondent's claim is predicated on Ostrander's actions which exposed her to danger and not on a custodial relationship, or the government's relationship to the criminal third-party. Committee Of U.S. Citizens In Nicaragua v. Reagan, 859 F2d 929, 950 (D.C. Cir. 1988), relied on by Petitioner, dealt with cases such as Martinez, supra and Nishiyama, supra, where liability was sought to be imposed based on the government's relationship with private criminal actors and its considerations are inapplicable to the instant case.

Judge Tjoflat's dissent in Taylor v. Ledbetter, 818 F2d 791, 815-16 (11th Cir. 1987), relied on by Petitioner, was not adopted by the majority therein.

Even assuming arguendo that "degree of

control" is a relevant consideration in this exposure to danger case, it can be deemed apparent that not only did Ostrander have "control" over the situation but he created the very plight from which Respondent ultimately suffered. Prior to Ostrander's arrival, Wood was in no danger. (Bell was pulled over for driving with his high beams on). Once he arrived, Respondent sought his help and he refused to give it. He had control over his vehicle, Bell's car, and ultimately Bell's car keys. While he could not have arrested Wood, he had the power to protect her from the dangers created by his intervention and engaged in actions that significantly diminished Wood's ability to help herself.

Assuming Whitley v. Albers, 475 U.S. 312, 320 (1986), and Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F2d at 950 mandate that the state's independent reasons for its actions should be examined, Petitioner never presented below any such legitimate reasons, but instead chose to deny Respondent's allegations and deny legal liability.

Petitioner's current post hoc rationale of "maybe a second patrol car would have been required" is entitled to little credence. No-

where is there any indication in the record that a second patrol car was required. The circumstances were not unduly hostile or violent. There is no indication that Ostrander had to be anywhere in a short period of time after his arrest of Bell. Nor does the record show that even if a second patrol car were required for Ostrander to fulfill his duty, that its acquisition would have effected Washington State Patrol efficiency.

No governmental interests were served by Ostrander's actions that would warrant the price suffered by Wood or counter-balance the societal interest in such situations in preventing citizens from becoming victims of crime.

3. Ostrander Was Properly Denied Qualified Immunity.

The qualified immunity analysis provided by the Ninth Circuit cannot be improved on by Respondent. 879 F2d at 591-96. Petitioner's dispute with the Ninth Circuit appears to be based primarily on the Court's determination that White v. Rochford, supra, constituted "clearly established" law in September of 1984. The Court in Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) did not

define how to determine when law is "clearly established". In the absence of such guidance, the Ninth Circuit developed its own test. See, e.g., Ward v. County of San Diego, 791 F2d 1329, 1332 (9th Cir. 1986); Ostlund v. Bobb, 825 F2d 1371, 1374 (9th Cir. 1987). The Ninth Circuit standard applied in this case provides:

> ... that in the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts to determine whether the right was clearly established. An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue.

Ward v. County of San Diego, 791 F2d at 1332. See, Harlow v. Fitzgerald, 457 U.S. at 818 n.32 (suggesting that the "state of the law" can be evaluated by examining all levels of federal court opinions).

The Ninth Circuit using this analysis found White to be extremely persuasive due to its factual similarities to the present case. It examined White from the perspective of how a reasonable law enforcement would interpret the

decision. 789 F2d at 592-93. The Court distilled the common sense teaching of White to be as follows:

> White holds that a police officer may be liable under Section 1983 when he abandons passengers of arrested drivers under circumstances which expose them to unreasonable danger.

879 F2d at 593.

Contrary to requiring law enforcement officers to over-analysis precedent as suggested by Petitioner, the majority opinion did exactly the opposite and reduced White to its simplest terms. Following its initial discussion of White, the Court did exactly what Petitioner suggests should be done and examined whether the cases' principles were firmly recognized and constituted an established trend in the law. 879 F2d at 593. The Court did not look "to clarify the result in White" because it did not understand its simple teachings. It did so to ensure that such principles were not merely obscure, confused, or subject to conflicting interpretations. The Court satisfied itself that White did not suffer such infirmities and found no "wide diversity" of opinions in the area. 879 F2d at 595.

The Ninth Circuit did not engage in "retrospective prediction" as they are accused of by Petitioner. It cited to Escamilla v. City of Santa Ana, 796 F2d 266 (9th Cir. 1986) for the purpose of completing the analysis mandated by Wood. The opinion explained at page 594:

> We do not look to Escamilla, a past-incident decision, to determine whether the law was "clearly established" at the time of the incident in the present case. We don't have to. By 1984, the law had been established by White and clearly articulated by Bowers and Jackson.

The Court went on to practically reason that if it relied on pre-incident cases in 1986 when it decided Escamilla, it also would have relied on them in 1984 when the incident happened. As the Ninth Circuit indicated by 1984 White was a well seasoned and recognized opinion that had been examined on several occasions and not disapproved.

If the law was "clearly established" a government official is presumed to know about it. Hobson v. Wilson, 737 F2d 1, 25 (D.C. Cir. 1984). Generally, the Ninth circuit has held that government officials are charged with the knowledge of constitutional and statutory

developments including all available decisional law. Gutierrez v. Mun. Ct. of S.E. Judicial Dist., 838 F2d 1031, 1048 (9th Cir. 1988); Tribble v. Gardner, 860 F2d 321, 324 (9th Cir. 1988). Ostrander's failure to know the law should not excuse him from liability.

Petitioner's reliance on Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) is misplaced.

Anderson recognized that the absence of a case law "directly on point" does not immunize an official from liability if the basic principles of law are "well established". See, Ostlund v. Bobb, 825 F2d at 1374; see generally Little v. Walker, 552 F2d 193, 197 (7th Cir. 1977).

Ostrander should be able to find little shelter when the applicable "clearly established" law was based on White which is, in fact, almost "directly on point". See, 879 F2d at 596. Ostrander should have understood his abandonment of Wood violated her constitutional rights.

Common sense should have also dictated to Ostrander that he was infringing on protected interests. See, generally Stoneking v. Bradford Area School Dist., 856 F2d 594, 599 (3rd Cir. 1988) vacated sub nom Smith v. Stoneking, ___ U.S. ___ 109 S.Ct. 1333, 103 L.Ed.2d 804 (1986)

on rehearing 882 F2d 720 (3rd Cir. 1989).

Ostrander's conduct could be deemed of such an egregious nature as to simply preclude a grant of qualified immunity. See, Bensen v. Allphin, 786 F2d 268, 276 n.18 (7th Cir. 1986); Powers v. Lightner, 820 F2d 818, 820 (7th Cir. 1987). It can be noted, the Ninth Circuit has specifically held that it was clearly established in 1984 that government officials could not engage in conduct that "shocks the conscience".

No reasonable police officer would have believed that under the circumstances alleged in the instate case that he was engaging in lawful conduct. If, in fact, Ostrander engaged in the conduct alleged, then it is suggested that his actions were that of a person acting in a "plainly incompetent" manner. See, Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It was a proper result for the Ninth Circuit to leave for a jury to decide the facts on which the immunity question will ultimately turn. See, Bilbrey v. Brown, 738 F2d 1462, 1466-67 (9th Cir. 1984); Thorstead v. Kelly, 858 F2d 571, 574-76 (9th Cir. 1988).

The Ninth Circuit's amended opinion provides an entirely separate grounds for denying immunity in that if a jury were to ultimately determine

that Ostrander acted with "deliberate indifference" to Respondent's constitutional rights, then such a finding would necessarily preclude a grant of immunity. 879 F2d at 591 n.7. See, Wood v. Sunn, 865 F2d 982, 987 (9th Cir. 1988); Miller v. Solem, 728 F2d 1020 (9th Cir. 1984); Albers v. Whitley, 743 F2d 1372, 1376 (9th Cir. 1984) reversed on other grounds, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

In Wood v. Sunn, 865 F2d at 986, the Court noted that Whitely prevented a defense of qualified immunity where a jury had found the defendant had acted with "deliberate indifference" because such a finding would be inconsistent with a finding of good faith immunity. It further noted that such findings would be "mutually exclusive".

It is suggested that on this basis alone, the Ninth Circuit was justified in not granting Ostrander immunity as a matter of law.

CONCLUSION

The Ninth Circuit's decision in the present case was analytically sound and reached an appropriate result. The decision did not conflict with Supreme Court decision and the decisions of other Circuit Courts on the question of duty. Nor did it pretend to provide a rule of

general application to be applied to the question of what constitutes the appropriate mental state in substantive due process claims. In any event, Petitioner waived consideration of the intermediate mental state issue by not raising it in the Ninth Circuit. The Court below properly denied Ostrander immunity and such a denial can be affirmed on several grounds. There is simply no reason to grant a writ of certiorari to review the issues raised by Petitioner.

DATED this 3rd day of April, 1990.

Respectfully submitted,
LAW OFFICES OF NEIL J. HOFF

NEIL J. HOFF
PAUL LINDENMUTH*
Attorneys for Respondent

*Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

NO. C85-1317MTB

LINDA K. WOOD,

Plaintiff,

vs.

STEVEN C. OSTRANDER, et. al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

THIS MATTER comes before the Court on the defendants' Motion for Summary Judgment Dismissing the Complaint on the basis that the plaintiff has failed to state a claim. The Court has reviewed the Motion, the memoranda and affidavits submitted by counsel and the records and files herein and now rules as follows:

Summary Judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the non-moving party that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Lew v. Kona Hospital, 754 F.2d 1420 at 1423 (9th Cir. 1985). The initial burden of showing the absence of a material fact rests on

the proponent. International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401 at 1405 (9th Cir. 1985).

This is a civil rights action based on 42 U.S. C. Sec. 1983. In support of the Motion for Summary Judgment the defendant first contends that the allegations in the Complaint amount to mere negligence and that under the holding of Daniels v. Williams, 106 S.Ct. 662 (1986) allegations of mere negligence are not sufficient to support a claim under 42 U.S. C. Sec. 1983. Alternatively, the defendant contends that even if the plaintiff was deprived of a protected interest cognizable under 42 U.S. C. Sec. 1983, there is a state tort procedure remedy available which satisfies the due process requirement of the Fourteenth Amendment. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420 (1981). These issues are addressed separately below.

I. DEPRIVATION OF A CONSTITUTIONALLY PROTECTED RIGHT.

Based on the affidavits submitted by the parties the undisputed facts are that the plaintiff and her boyfriend, Robert Bell, were driving down Pacific Avenue at about 2:30 a.m. on September 23, 1984. Trooper Ostrander stopped the Bell automobile near 136th and Pacific

Avenue. Mr. Bell was arrested for "driving while intoxicated," placed in the officer's patrol car, and was later taken from the scene. In the interim the officer returned to Mr. Bell's car, removed the car keys and asked the plaintiff to get out of the car. After the officer left the scene, the plaintiff took a ride with a stranger and was raped. (Plaintiff's Complaint, page 2.)

The parties vary in their recollection of other circumstances and occurrences that evening. The defendant alleges that the traffic stop occurred at 136th and Pacific Avenue where, at the time, there were two clearly visible all-night facilities open to the public: i.e., a 24-hour Shell station located approximately two blocks in one direction, and a 24-hour 7-11 store located approximately one-half block in the other direction. The plaintiff alleges that she had five or six beers over the course of the evening (8:30 p.m. to 2:30 a.m.) and that neither she nor her boyfriend, Robert Bell, were intoxicated. She claims that when the trooper came to the car to get the car keys she asked him how she was going to get home and that he merely responded that she had to get out of the car.[1] She claims

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[1] The defendant denies that he did not offer assistance to the plaintiff, but not by affidavit. See Joint Status Report filed July

the trooper never asked if she was capable of driving nor did he offer to provide her a ride or make other arrangements for transportation in any way. She was left on the side of the road five miles away from her home. She had no money with her for a cab or bus. She recalled that it was a cold evening and that she was dressed only in jeans and a blouse. She did not see any businesses open that night in the vicinity.

In order to state a claim under 42 U.S.C. 1983 the plaintiff must allege a deprivation of a right secured by the Constitution. In the companion cases of Daniels v. Williams, 106 S.Ct. 662 (1986) and Davidson v. Cannon, 106 S.Ct. 668 (1986), the Supreme Court stated that the mere lack of due care of an official causing intended injuries to life, liberty or property does not implicate the Due Process Clause of the Fourteenth Amendment.

> Respondents' lack of due care in this case led to serious injury, but that lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. Daniels, supra, at 665-66.
>
> Davidson v. Cannon, supra, at 670.

15, 1986.

The Court held that mere negligence by a state official is not a deprivation intended to be protected by the Civil Rights Act. Based on the undisputed acts, the defendant contends that Trooper Ostrander's actions in this case can only be characterized as, at most, merely negligent. Therefore, the defendant contends the plaintiff has not stated a claim cognizable under the Civil Rights Act. The case is not that clear.

As stated in Daniels v. Williams, supra, at 665 the focus of the inquiry should be on whether there has been an abuse of power by a state official.

> . . . This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers to government," Hurtado v. California, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. (17 U.S.) 235, 244, 4 L.Ed. 559 (1819)). See also, Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935

(1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889)."); Parratt, supra, 541 U.S. at 549, 101 S.Ct., at 1920 (POWELL, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty or property," the Due Process Clause promotes government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being "used for purposes of oppression," Murray's Lessee v. Hoboken Land and Improvement Company, 18 How. (59 U.S.) 272, 277, 15 L.Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment).

In Davidson and Danielson, supra, the court declined to address whether gross negligence or actions which could be characterized as reckless disregard or deliberately indifference to a person's liberty could constitute a deprivation cognizable under the Civil Rights Act. The question in this case is whether Trooper

Ostrander's actions can be characterized as merely negligent or whether Trooper Ostrander's actions were an abuse of power. More specifically, can his actions be characterized as actions taken intentionally and with reckless disregard to plaintiff's Constitutionally protected liberty interest in her personal security.[2] Upon review of the disputed facts and facts left unresolved by the affidavits of the parties, Trooper Ostrander's actions cannot be so clearly characterized as merely negligent. The plaintiff has raised genuine issues of material fact. The summary judgment must be denied.

II. STATE TORT REMEDY

In the alternative, the defendant contends even if it can be assumed that the plaintiff has been deprived of a constitutionally protected right by a state official, the state tort procedure provides a sufficient remedy to satisfy due process citing Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420 (1981). In the Parratt case the plaintiff brought an action in federal district court against prison officials

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[2] Issues in making this determination include, but are not limited to, whether Trooper Ostrander did, as he alleges, offer assistance to the plaintiff, the degree of plaintiff's intoxication, and the policies, if any, of the Washington State Patrol in providing assistance to passengers in this situation.

to recover the value of hobby materials claiming a State official had negligently lost the material and thereby denied the plaintiff of property without due process of law in violation of the Fourteenth Amendment. The Supreme Court held that the state tort law provided an adequate post-deprivation remedy to satisfy due process. As the concurring opinion of Justice Stevens in Danielson and Davidson, supra, at 677 explains, there are three different kinds of constitutional protections incorporated into the Fourteenth Amendment. One protection, the substantive due process component, bars certain arbitrary government action regardless of whether there is a pre- or post-deprivation remedy.

> We should begin by identifying the precise constitutional claims that petitioners have advanced. It is not enough to note that they rely on the Due Process Clause of the Fourteenth Amendment, for that Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First and Eight Amendments; so too, the State must respect

the guarantees in the Fourth, Fifth, and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Ante, at 665. third, it is a guarantee to fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.

* * *

Similarly, if the claim is in the second category (a violation of the substantive component of the Due Process Clause), a plaintiff may also invoke Sec. 1983 regardless of the availability of a state remedy. For, in that category, no less than with the provisions of the Bill of Rights, if the Federal Constitution prohibits a State from taking certain action "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the

> prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of Sec. 1983.

In Rutherford v. City of Berkeley, 780 F.2d 1444 at 1447 (9th Cir. 1986), the court distinguished procedural due process claims from substantive due process claims in 1983 cases holding that the availability of a State court remedy does not bar federal relief under 42 U.S. C. Sec. 1983 on a claim of substantive due process.

> . . . Because the substantive due process is violated at the moment the harm occurs, the existence of a post-deprivation state remedy should not have any bearing on whether a cause of action exists under Sec. 1983. With this in mind, we concur in the rationale set forth in the Eleventh Circuit in Gilmere v. City of Atlanta, Ga., 774 F.2d 1495, 1498 (11th Cir. 1985), that the existence of postdeprivation state remedies does not bar a substantive due process claim under Sec. 1983.

See also, Mann v. City of Tucson, Dept. of Police, 782 F.2d 790 (9th Cir. 1986).[3] The

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[3] In so ruling, this court shares the concerns expressed by the Honorable Justice Sneed in his concurring opinion. Considering the fact

plaintiff contends that this complaint is based on substantive due process, not procedural due process. In reviewing the plaintiff's complaint as originally filed, it is not limited to allegations of procedural due process. Therefore, the availability of the State tort procedural due process remedy is not relevant to this summary judgment motion.

Based on the foregoing opinion, it is hereby ORDERED the defendants' Motion for Summary Judgment of Dismissal is hereby **DENIED WITHOUT PREJUDICE.**

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 12th day of November, 1986.

ss._____

ROBERT J. BRYAN
United States District
Judge

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that many Section 1983 claims can be characterized as ordinary torts and considering that an artful pleader can merely allege substantive due process as opposed to procedural due process, parties should not be allowed to convert what is essentially a state proceeding into a federal action by artful pleading, avoiding the defense that there is a state court post-deprivation tort remedy available.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA
NO. C85-1317TB

LINDA K. WOOD,

Plaintiff,

vs.

STEVEN C. OSTRANDER, individually, and as a Trooper of the Washington State Patrol; MARGARET E. OSTRANDER, his wife, and the marital community comprised thereof; NEIL MALONEY, individually, and as Chief of the Washington State Patrol, and the marital community comprised thereof,

Defendants.

AMENDED COMPLAINT

COMES NOW Plaintiff, LINDA K. WOOD, by and through her attorney-of-record, and alleges and complains as follows:

I

This action involves a question of Federal law. Jurisdiction is vested in this Court by virtue of 28 U.S.C. Sections 1331 and 1343. The subject Federal laws are 42 U.S.C. Sec. 1983, and

the Fourteenth Amendment to the United States Constitution.

II

That at all times relevant, Plaintiff Linda K. Wood was a resident of Pierce County, Washington.

III

That all acts alleged herein (unless otherwise indicated), occurred in Tacoma, Pierce County, Washington.

IV

That Defendant Steven C. Ostrander is and was at all times relevant an Officer of the Washington State Patrol, and was acting for the benefit of his marital community.

V

That Defendant Steven C. Ostrander was at all times relevant acting under color of State law and under color of his position as a Trooper of the Washington State Patrol, and as such, is a named Defendant herein individually, and in his official capacity.

VI

That Defendant Neil Maloney was at all times relevant, the Chief Officer of the Washington State Patrol. In such capacity, he was the commanding officer over Trooper Ostrander, and

responsible for the training and conduct of said Defendant, and as such, is a named Defendant herein individually, and in his official capacity. Said Defendant's alleged actions were done under the color of State law, under the color of his official capacity, and on behalf and for the benefit of his marital community.

VII

On or about September 23, 1984 at approximately 2:45 a.m. thereon, Plaintiff Linda K. Wood was assaulted and raped following a traffic arrest. The scene began out on Pacific Avenue near its intersection with South 136th Street.

VIII

At the above noted location, Trooper Ostrander pulled over an automobile in which Plaintiff was a passenger. The vehicle was being driven by Linda K. Wood's boyfriend, who allegedly was stopped for having his car lights on high beam.

IX

After a confrontation between the Trooper and the boyfriend, the boyfriend was arrested and taken to jail. The trooper took the car keys to Plaintiff's boyfriend's car, despite Plaintiff's requests for help. The Plaintiff was left

abandoned on the side of the roadway by the Trooper.

X

No public transportation was available. The roadway was dark and she was unprotected. The Trooper had removed the protection that her boyfriend and his car had afforded. The night was cold and damp. The Plaintiff was wearing only a blouse and a pair of jeans. She had no money. After Plaintiff had refused approximately three offers by men who were driving by, Plaintiff fearfully accepted a ride.

XI

The driver of the car in which Plaintiff had accepted a ride, drove the Plaintiff into a secluded area, attacked and raped her.

XII

Approximately 9 months and one day later, on June 24, 1985, the Plaintiff gave birth to Dominic Wood at St. Joseph Hospital in Tacoma, Pierce County, Washington. That it is alleged that the unknown rapist is the father of Dominic Wood.

XIII

That Trooper Ostrander's actions in abandoning the Plaintiff without transportation or protection was an intentional act done

willfully and with total reckless disregard for Plaintiff's safety. Such act could not have occurred had Trooper Ostrander not abused the authority and power vested in him under color of State law.

XIV

Alternatively, that Trooper Ostrander's actions in abandoning Plaintiff without transportation or protection was an act done in a grossly negligent manner that could not have occurred had Trooper Ostrander not abused the authority and power vested in him under the color of State law.

XV

That Trooper Ostrander's abandonment of Plaintiff violated her rights secured under the Fourteenth Amendment of the United States Constitution, and is conduct actionable under 42 U.S.C. Sec. 1983.

XVI

That Trooper Ostrander's abandonment of Plaintiff constituted negligent and outrageous conduct under the laws of the State of Washington.

XVII

That Plaintiff has filed a claim with the State of Washington pursuant to RCW 4.92.100, et.

seq.

WHEREFORE, Plaintiff prays for judgment as follows:

1. General and special damages incurred by the Plaintiff proximately resulting from the conduct of Steven C. Ostrander, including, but not limited to the expense of bearing and raising the Plaintiff's child, Dominic Wood.

2. General and special damages incurred by Plaintiff as the proximate result of Defendant Neil Maloney's failure to properly train, supervise and control the actions of his subordinate, Steven C. Ostrander.

3. General and special damages incurred by the Plaintiff as the proximate result of Defendant Neil Maloney's negligent hiring and retention of Steven C. Ostrander as a Trooper of the Washington State Patrol.

4. General and special damages incurred by the Plaintiff as a result of the deprivation of the Plaintiff's civil rights which occurred as a proximate result of the behavior and activities of Steven C. Ostrander and Neil J. Maloney.

5. Punitive damages.

6. An award of costs and attorney's fees pursuant to 42 U.S. C. Sec. 1988.

7. For such further and equitable relief

which the Court deems just.

8. That this pleading be deemed amended to confirm to the proof presented at time of trial.

DATED this 4th day of March, 1987.

LAW OFFICES OF NEIL J. HOFF

ss. By:_____

NEIL J. HOFF

of Attorneys for Plaintiff